

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Brenda Smith	:	
	:	
v.	:	F-2015-2472890
	:	
Blue Pilot Energy LLC and	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Dennis J. Buckley
Administrative Law Judge

INTRODUCTION

This Initial Decision sustains the Complaint filed by Brenda Smith (Complainant) against Blue Pilot Energy, LLC (Blue Pilot) and orders Blue Pilot to refund Complainant a \$5,207.61 overcharge.

HISTORY OF THE PROCEEDING

On March 15, 2015, Complainant filed a formal Complaint at this docket against Blue Pilot and PPL Electric Utilities Corporation (PPL). The basis of the Complaint was that Blue Pilot had not provided Complainant with the lowest possible electric supply rate, which Complainant contends that she had been promised, thereby increasing her rate without her knowledge. The undisclosed rate increases led, in turn, to a series of higher monthly bills. Complainant requested a refund of excess charges paid or a credit. The Complaint is a timely

appeal of a determination by the Commission's Bureau of Consumer Services (BCS) at Case No. 3249126, which was closed February 2, 2015.¹

On April 7, 2015, Blue Pilot filed an Answer to the Complaint in which Blue Pilot denied any violation of the Public Utility Code (Code) or the rules and regulations of the Commission and sought to raise a number of "affirmative defenses."²

On April 9, 2015, PPL filed an Answer to the Complaint and a Preliminary Objection to the Complaint. PPL's Answer denied that Complainant had been improperly billed. PPL's Preliminary Objection was made on the grounds of legal insufficiency because Complainant had not alleged any wrongdoing by PPL in her Complaint. PPL requested that the Complaint against PPL be dismissed.

From that point, the proceeding was held in abeyance as the parties discussed possible settlement against the backdrop of multiple Complaints filed against Blue Pilot in the context of that entity's difficulties in the wake of variable price charges made by Blue Pilot during the Polar Vortex of 2013-2014. On July 7, 2016, an Initial Decision was issued in *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655. That case was later decided by the Commission at its May 3, 2018 public meeting. However, the case at this docket was not included in the Initial Decision.³

¹ Informal BCS decisions are "determinations" whereas the result of a Formal Complaint is termed a "decision." In addition, informal BCS determinations are governed primarily by Sections 3.111 to 3.113, 52 Pa. Code § 3.111 *et seq.*, whereas Formal Complaints are governed by Chapter 5, 52 Pa. Code, § 5.1 *et seq.* More importantly, informal BCS determinations expressly notify the Complainant of a right to appeal by filing a Formal Complaint. If filed, the Commission provides a hearing *de novo*. The BCS functions as an informal arbiter of disputes between a utility provider and customers. 66 Pa.C.S.A. § 308(d). This function usually produces cost-effective results without additional use of agency resources and time. However, the Commission has never agreed to be formally bound by these informal determinations. See *Derek Suggs & Beverly Marell v. Bell Telephone Company of Pennsylvania*, Docket No. F-00162258 (Order entered July 15, 1993).

² Although the matter was never raised by the Complainant, who is not an attorney, Blue Pilot's Answer was not filed by an attorney licensed to practice law in the Commonwealth of Pennsylvania nor admitted *pro hac vice*.

³ The refund requested in Ms. Smith's Formal Complaint is not fully addressed by the *Blue Pilot* decision. Ms. Smith requested a refund for the time period of November 21, 2013 through April 24, 2014. In Ms. Smith's case, the remedy for the *Blue Pilot* case at Docket No. C-2014-2427655 would encompass only the time period from November 21, 2013 through March 23, 2014. It would not address the period of the fifth month identified in Ms. Smith's complaint from March 24, 2014 through April 28, 2014.

On July 26, 2017, a hearing Notice was issued setting August 31, 2017, as the date for an evidentiary hearing in this case.

On August 22, 2017, the Pennsylvania Office of Consumer Advocate (OCA) filed a Notice of Intervention and a Public Statement in this case. The Intervention was not opposed.

On August 31, 2017, an in-person hearing was held at the Office of the Commission in Harrisburg, Pennsylvania. Brenda Smith, the Complainant, appeared on her own behalf. Kristine E. Marsilio, Esquire and Candis A. Tunilo, Esquire, appeared on behalf of the OCA, though they essentially presented and subsequently argued Complainant's case. Karen O. Moury, Esquire, appeared on behalf of Blue Pilot. The Complainant was the sole witness at this hearing, and several of her electric bills were received into evidence marked collectively as Exhibit BS-1. It was agreed at the start of the hearing that PPL had resolved any issues with Complainant and that a Certificate of Satisfaction would be filed post hearing. At the close of the hearing, Blue Pilot and the OCA requested the establishment of a briefing schedule. Main Briefs were due on October 17, 2017, with Reply Briefs due on October 31, 2017.

On September 5, 2017, PPL filed a Certificate of Satisfaction stating that all issues with respect to PPL had been resolved. That Certificate of Satisfaction was not objected to by Complainant.

On September 11, 2017, a transcript of thirty-six pages was filed with the Secretary of the Commission. The transcript along with Exhibit BS-1 constitutes the record in this case. The record closed with the filing of the transcript. On October 17, 2017, the OCA and Blue Pilot filed Main Briefs. On October 31, 2017, the OCA and Blue Pilot filed Reply Briefs.

This matter is now ready for adjudication.

FINDINGS OF FACT

1. Brenda Smith is the Complainant in this case.

2. Complainant resides at 159 Alva Drive, Harrisburg, Pennsylvania, which is also the service address in this case.

3. PPL Electric Utilities Corporation was originally listed as a Respondent in this matter, but on September 5, 2017, PPL filed a Certificate of Satisfaction stating that all issues with respect to PPL had been resolved.

4. The Respondent is Blue Pilot Energy, LLC, a Commission licensed electric generation supplier (EGS) that supplied electricity to the Complainant.

5. Complainant switched EGSs from PPL to Blue Pilot in 2012. Tr. at 33.

6. Complainant switched to Blue Pilot as the result of a telemarketing phone call. Tr. at 15.

7. Complainant was told by a Blue Pilot representative that Blue Pilot would save her money by providing the lowest rate available. Tr. at 15, 30, 33.

8. It was not disclosed to Complainant that she was signing up for a variable rate that might increase her bills. Tr. at 16, 30.

9. The price to compare on Complainant's January, 2014 bill from PPL, which comprised billing from November 21, 2013 through December 23, 2013, was .08754 per kilowatt hour. Tr. at 19-20; Exhibit BS-1.

10. Blue Pilot's generation charge for billing to Complainant from November 21, 2013, through December 23, 2013, was .1050 per kilowatt hour. Tr. at 20; Exhibit BS-1.

11. Blue Pilot's generation charge for billing to Complainant from December 23, 2013, through January 23, 2014, was .1090 per kilowatt hour. Tr. at 22-24; Exhibit BS-1.

12. Blue Pilot's generation charge for billing to Complainant from January 23, 2014 through February 24, 2014, was .4490 per kilowatt hour. Tr. at 25-26; Exhibit BS-1.

13. Blue Pilot's generation charge for billing to Complainant from November, 2013, through April, 2014, when Complainant switched back to PPL, was always higher than the price to compare and resulted in an overcharge to Complainant in the amount of \$5,207.61, the difference between the amount that Blue Pilot charged Complainant and the amount that Complainant would have been charged had she remained with PPL from November 21, 2013 through April 28, 2014. Tr. at 26-28; Exhibit BS-1.

DISCUSSION

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm'n.*, 479 A.2d 10 (Pa.Cmwlth. 1984). This due process requirement is satisfied when the parties are provided with notice and an opportunity to be heard. *Id.*

As a matter of law, to establish a legally sufficient claim, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990). The offense must be a violation of the Public Utility Code, a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa. C.S. § 701.

Section 332(a) of the Public Utility Code (Code) provides that a complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa. C.S.

§ 332(a). The burden of proof for actions before the Commission is the, "preponderance of the evidence" standard. *Suber v. Pennsylvania Comm'n on Crime and Delinquency*, 885 A. 2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992) (*Lansberry*); see also *North American Coal Corp. v. Air Pollution Commission*, 279 A.2d 356 (Pa. Cmwlth. 1971). To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party. See *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 48-49, 70 A.2d 854, 855 (1950).

The burden of proof is comprised of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Initial Decision issued May 11, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. It may shift between the parties during a hearing. If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. See *Id.* If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant's claim. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001); *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*. 501 Pa. 433, 461 A.2d 1234 (1983).

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. See *Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the

party seeking affirmative relief from the Commission. In determining whether a complainant has met the burden of persuasion, the ultimate fact-finder may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. See *Moore*, citing *Suber*.

In her Complaint, Ms. Smith alleged that Blue Pilot had misrepresented the terms of an electric generation supplier agreement with Complainant. Complainant requested that the Commission direct Blue Pilot to refund the amount that Blue Pilot allegedly overcharged Complainant for electric generation service. Complainant testified that a representative of Blue Pilot had, during a telemarketing call, told her that Blue Pilot would save her money by providing the lowest rate available. At the hearing, Complainant testified that she understood this to mean that Blue Pilot would always shop for and provide the lowest rate available, or a variable rate (albeit one consistently in the Complainant's favor). Complainant presented several bills containing charges from Blue Pilot at a higher rate than PPL's price to compare. Those bills were for a period from November, 2013 to May, 2014. Exhibit BS-1. The calculation of the \$5,207.61 amount that Complainant specified as owed to her as a refund or credit is set forth on the first page of Exhibit BS-1. This specific amount was not contested. However, Blue Pilot disputed the Commission's authority to order a refund or credit.

I accept the Complainant's uncontradicted testimony as credible; however, several issues arose in this case which must be addressed in this Decision:

1. Does Complainant's testimony based on a conversation with Blue Pilot's agent, fall within an exception to the hearsay rule?
2. Does the Commission have the authority to order Blue Pilot to issue a refund or credit to the Complainant?
3. Does the Complainant's failure to file a Reply to Blue Pilot's, "New Matter" cause relevant facts stated in the "New Matter" to be deemed to be admitted?

I also note that on brief, the parties argued about how Blue Pilot handled Ms. Smith's original complaint against Blue Pilot administratively as well as the alleged failure by Blue Pilot to present Ms. Smith with a disclosure statement. Blue Pilot contends that it was not afforded adequate notice that these matters would be in controversy. Blue Pilot Reply Brief at 1-2. I agree, as neither issue was raised in Ms. Smith's original Complaint, nor was the Complaint subsequently amended to include these allegations. Consequently, as a matter of due process these matters may not be addressed in this Decision.

1. Hearsay Issue

Hearsay is an out-of-court statement made by a declarant that is offered by a party to prove the truth of the matter asserted in the statement. *See* Pa. R.E., Rule 801. The general rule against hearsay is that hearsay is inadmissible at trial unless it falls into one of the recognized exceptions to the hearsay rule pursuant to the Pennsylvania Rules of Evidence, other rules prescribed by the Pennsylvania Supreme Court, or statute. *See* Pa. R.E., Rules 801, 802, 803, 803.1, 804. The rationale for the rule against hearsay is that hearsay lacks the guarantees of trustworthiness to be considered by the trier of fact; however, exceptions have been fashioned to accommodate certain classes of hearsay that are substantially more trustworthy than hearsay in general, and thus merit exception to the rule against hearsay. *See e.g. Commonwealth v. Kriner*, 915 A.2d 653 (Pa. Super. 2007); *Commonwealth v. Cesar*, 911 A.2d 978 (Pa. Super. 2006); *Commonwealth v. Bruce*, 916 A.2d 657 (Pa. Super. 2007).

At hearing, counsel for Blue Pilot objected to Complainant's testimony with respect to her discussion with a Blue Pilot sales agent as hearsay, an objection that I overruled, allowing Complainant to testify.⁴ Blue Pilot, however, presented no testimony or exhibits at the hearing, thus making the entire evidentiary record in this case the testimony of Complainant and Exhibit BS-1.

Both Blue Pilot and Complainant subsequently briefed the hearsay issue.

⁴ Tr. at 14. Counsel for Blue Pilot noted a continuing hearsay objection to Complainant's testimony.

On brief, Blue Pilot argued that hearsay evidence uncorroborated by other, competent evidence may not be relied on in deciding a case, which is correct provided that the evidence is not also subject to an exception to the hearsay rule. Blue Pilot relied primarily on the 2015 case of *Gruelle c/o Toll Diversified Properties, Inc. v. PPL Electric Utilities Corporation and Blue Pilot Energy, LLC*, Docket No. C-2015-2463573 (Order entered December 22, 2015). I note that in *Gruelle*, the facts are generally analogous to those in the present case. Complainant in *Gruelle* alleged misrepresentation and overbilling by Blue Pilot, and counsel for Blue Pilot posed the same hearsay objection as was made in this case. The administrative law judge in *Gruelle* summarized a very serious concern (which I share in the present case) with respect to sustaining that hearsay objection and excluding a complainant's testimony on the basis that the company's agent is not present:

The Commission regulations do say that a supplier can't make false or misleading representations and may not engage in misleading or deceptive conduct. But you're actually saying that it doesn't matter if we did because when it comes time to the hearing, we're going to have it thrown out as hearsay. So that pretty much makes that regulation useless. So I think from this point of view, I'm going to allow the testimony, and then you can Cross.

Gruelle Tr. at 9.

The judge in *Gruelle* did not defer a ruling on the hearsay objection. She allowed the testimony of the complainant over that objection. The judge then decided against relying on that testimony because of what the judge regarded as both the hearsay nature of the testimony *and* a finding that complainant's testimony was not credible:

While the Complainant may refer to the hearsay as an admission against interest here, the inconsistencies in Ms. Gruelle's testimony results in a finding that Ms. Gruelle's claims that the Respondent's representative promised her that the rate would either be subject to renegotiation after 180 days or her account would be returned automatically to default service, is not credible.

Gruelle Initial Decision at 16-17.

With all due respect to my colleague, and while I certainly do not dispute her credibility determination, we cannot have this both ways. Either the proffered testimony in such a case is hearsay, should be excluded and is not subject to a credibility determination, or it falls within an exception to the hearsay rule, is allowed and is subject to a determination of credibility.

Blue Pilot argued that in *Gruelle*, the Commission ultimately dismissed the complaint on the basis that the only evidence presented at the hearing was the complainant's own hearsay account of the statements of a sales agent. This is a bit of an oversimplification and overstatement given that the *Gruelle* decision became final via an "Act 294" Order without comment by the Commission. Nevertheless, Blue Pilot is generally correct in stating:

In dismissing the complaint, the Commission [Actually, the presiding officer in her Decision] noted that "[t]he conversation occurred outside the hearing room, the declarant is not available for cross examination, and the content is the sole evidence relied upon by Complainant to support its case for a claim of overbilling and refund." [fn. omitted] The Commission [Again, the presiding officer] added that the complainant could have but elected not to subpoena the sales agent.⁵

Blue Pilot Main Brief at 4-5.

While I agree that counsel for Blue Pilot has accurately summarized the ultimate holding in *Gruelle*, the resolution of the hearsay issue therein is procedurally and substantively distinguishable from this case. Significantly, after the complainant testified in *Gruelle*, Blue Pilot put on a case in opposition to complainant's case based on business records which the presiding officer found revealed inconsistencies in the complainant's testimony. Blue Pilot did not put on a case in the present proceeding. Further, *Gruelle* was at odds with the Commission's determination in the earlier case of *C.S. Warthman Funeral Home, et al. v. GTE North, Incorporated*, Docket No. C-00924416 (Order entered June 4, 1993). *Warthman* will be discussed, below. Finally, the resolution of the hearsay issue in *Gruelle* has not been followed in later cases which will also be discussed, below.

⁵ Given that the testimony of a complainant in a case such as *Gruelle* (and the present case) is subject to an exception to the hearsay rule, there is no need for the complainant to subpoena the agent. Rather, it is the respondent who makes the choice of whether to call its agent as a rebuttal witness.

In its Main Brief in this case, the OCA relied primarily on the 2016 case of *Herp v. Respond Power, LLC*, Docket No. C-2014-2413756 (Opinion and Order Jan. 28, 2016) (*Herp*). The OCA argues that Complainant’s testimony regarding statements made by Blue Pilot’s sales agent is not hearsay but constitutes the opposing party’s statements to Complainant, which is an exception to the hearsay rule.⁶ OCA Main Brief at 13-15; OCA Reply Brief at 2. OCA contends that in *Herp*, the Commission addressed the issue of whether statements made by a representative or agent of an EGS constitute hearsay. *See Herp* at 27-30.

Herp is yet another case in which a Complainant was told by an electric generation supplier’s (EGS) sales agent that Complainant’s bill would, “always be lower.” *Herp Opinion and Order* at 2. I do, however, note that in *Herp*, because the hearsay issue was not raised until the parties filed exceptions, the Commission found that the respondent, Respond Power, had waived that objection. *Herp* at 27. That being said, the Commission nevertheless went on to address the hearsay issue so that the evidentiary support for the Commission’s findings in *Herp* would be clear. *Herp* at 27. Specifically, in *Herp*, the Commission held that: “The contents of an agent’s oral sales representations constitute an opposing party’s statement, previously referred to in Pennsylvania case law as a party admission, which is an exception to the hearsay rule regardless of the availability of the agent as a witness.” *Herp* at 29, *citing* Pa. R.E. 803(25). The Commission also held that such statements are capable of supporting a finding of fact. *See Herp Opinion and Order* at 27-28. The Commission concluded:

We find that Mr. Herp has supported his complaint with credible testimony, based on his first-hand contact with Respond’s agents.

* * *

Mr. Herp’s testimony was the only evidence in the record of the actual events that occurred in this proceeding with respect to Mr. Herp’s transactions. As the ALJ noted, Respond chose not to present the testimony of the actual third-party marketer, its agents under our regulations, to refute the nature of the oral representations made.

Herp Opinion and Order at 28.

⁶ OCA also cites the Pennsylvania Rules of Evidence 803(25) as does the Commission in its *Herp* Opinion and Order: “An Opposing Party’s Statement. The statement is offered against an opposing party and was made by the party’s agent or employee on a matter within the scope of that relationship and while it lasted. Opposing party’s statements are ‘not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.’” OCA Reply Brief at 3.

Herp is both more factually analogous to the present case than is *Gruelle* and is correct on the law. I agree with the OCA that the Commission's reasoning and holding in *Herp* regarding the hearsay objection and the admissibility of statements made by an EGS's agent are controlling in this proceeding.

I also note that in the recent case of *Catherine J. Frompovich v. PECO Energy Company*, Docket No. C-2015-2474602 (Order entered May 3, 2018), the Commission addressed the hearsay issue and exceptions to the hearsay rule, relying in part on the case of *Chapman v. Unemployment Compensation Board of Review*, 20 A. 3d 603, fn. 8 (Pa. Cmwlth. 2011) (*Chapman*). While counsel did not have the advantage of reading the *Frompovich* decision before they filed their briefs, this most recent decision by the Commission addresses the hearsay issue and definitively resolves the question of admissibility in this case.

In *Frompovich*, the Commission ruled that whether simple hearsay may support a finding of an agency depends on whether the evidence meets the criteria of the *Walker/Chapman* rule. The *Walker/Chapman* rule provides that simple hearsay evidence may support an agency's finding of fact so long as the hearsay is admitted into the record without objection and is corroborated by competent evidence in the record. *See Walker v. Unemployment Compensation Board of Review*, 367 A. 2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*) (citations omitted); *see also Chapman v. Unemployment Compensation Board of Review*, 20 A. 3d 603, fn. 8 (Pa. Cmwlth. 2011) (*Chapman*). Specifically, the Commonwealth Court stated:

Hearsay evidence, *properly objected to*, is not competent evidence to support a finding of the agency...Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of an agency if it is corroborated by any competent evidence in the record . . . a finding of fact based solely on hearsay will not stand.

Walker, 367 A. 2d at 370 (emphasis added).

However, to be "properly objected to," in an administrative proceeding, the hearsay evidence must not fall within one of the recognized exceptions to the rule against hearsay. Hearsay that falls within one of the recognized exceptions to the hearsay rule is

competent evidence that may be relied upon by the agency. *See Chapman*, supra, n. 8 (finding that the Board properly relied upon a party's admission as competent evidence as a recognized exception to the hearsay rule); *See also* Pa. R.E., Rules 802, 803, 803.1, 804.

In Pennsylvania, statements against interest made by an unavailable declarant, while hearsay, are excepted from the hearsay rule. This was recognized in the Commission's decision in *C.S. Warthman Funeral Home, et al. v. GTE North, Incorporated*, Docket No. C-00924416 (Order entered June 4, 1993):

Hearsay is defined in Pennsylvania as "an out-of-court statement offered to prove the truth of the matter asserted." *Commonwealth v. Cassidy*, 315 Pa. Super 429, 462 A.2d 270 (1983). It has long been held in Pennsylvania that statements made by an unavailable declarant and a declaration against interest, while hearsay, are excepted from the hearsay rule. *DelVitto v. Schiavo*, 370 Pa. 299, 87 A.2d 913 (1952); *Rudisill v. Cordes*, 333 Pa. 544, 549 5 A.2d 217, 219 (1939); *Heddings v. Steele*, 514 Pa. 569; 526 A.2d 349 (1987). However, an administrative decision based on hearsay may be overturned by the courts. *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945). [fn. omitted] For this reason, Pennsylvania courts do not regard the hearsay rule as a technical rule of evidence, but a basic, vital and fundamental rule of law, which ought to be followed by administrative agencies at those points in their hearings, when facts crucial to an issue are sought to be placed upon the record. *Bleilevens v. Pa. State Civil Service Commission*, 11 Pa. Commonwealth Ct. 1, 312 A.2d 109 (1973). The general rule is that hearsay evidence, properly objected to, is not competent to support a finding in an administrative hearing; however, hearsay evidence admitted without objection may support a finding, only if corroborated by competent evidence in the record. *Anderson v. Pa. Department of Public Welfare*, 79 Pa. Commonwealth Ct. 182, 468 A.2d 1167 (1983). The Commission's hearsay determinations are governed by those standards. *Nicklas* at 22-23. *However, agent acts or declarations, like those of an attorney, when made in the course of one's business and within the scope of one's authority, either express or implied, are admissible against one even if they are hearsay.* *Nicklas* at 23-24; *Overholtzer v. McMichael*, 10 Pa. 139 (1848); *Truby v. Seybert*, 12 Pa. 101, 104 (1849); *Bell v. Scranton Trust Co.*, 282 Pa. 562, 570, 128 A.2d 494, 496 (1925); *Neel v. Crittenden*, 353 Pa. 201, 205, 44 A.2d 558, 560 (1945); See, Henry, Pennsylvania Evidence, Fourth Edition (1953), § 96, p. 143. *In this case as in Nicklas, the express or implied authority of the client's agent to make such a declaration is obvious. Furthermore, admissions against interest made by a party have long been held to be admissible in civil proceedings as a recognized*

exception to the hearsay rule. Nicklas at 24; Geiger v. Schneyer, 398 Pa. 69, 157 A.2d 56 (1959); *Gougher v. Hansler*, 388 Pa. 160, 130 A.2d 150 (1957); *Unemployment Compensation Board of Review v. Houp*, 20 Pa. Commonwealth Ct. 111, 340 A.2d 588 (1975). [fn. omitted] The courts have applied this principle to administrative hearings as well. *Murphy v. Com. Dept. of Public Welfare*, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382, 386 (1984).

Id. at 22-24 (emphasis added).⁷

In the present controversy, Complainant testified based on her direct conversation with Blue Pilot's sales agent. Ms. Smith's testimony is the only evidence on record in this proceeding and is directly related to her experience with Blue Pilot's sales agent. Blue Pilot chose not to present the rebuttal testimony of Blue Pilot's sales representative, the call recording when Ms. Smith initiated service, or any evidence in contravention of Complainant's testimony. Thus, the evidentiary record in this case consists of Complainant's uncontradicted testimony.

Although Complainant was not able to recall the name of the Blue Pilot employee with whom she discussed her subsequent meter and billing issues, I found her testimony with respect to her original conversation with Blue Pilot's sales agent to be credible and persuasive. Complainant established the following facts: Complainant switched EGSs from PPL to Blue Pilot in 2012. Complainant switched to Blue Pilot as the result of a telemarketing phone call. Complainant was told by a Blue Pilot representative that Blue Pilot would save her money by providing the lowest rate available. It was not disclosed to Complainant that she was signing up for a variable rate. Findings of Fact Nos. 5-8. Blue Pilot's generation charge for billing to Complainant from November, 2013, through April, 2014, when Complainant switched back to PPL, was always higher than the price to compare and resulted in an overcharge to Complainant in the amount of \$5,207.61. Finding of Fact No. 13, Exhibit BS-1.

Finally, in its Reply Brief, Blue Pilot again relied on *Gruelle*, attempting to distinguish *Herp* as a departure from well-settled precedent. Blue Pilot Reply Brief at 1-4. Blue Pilot is in error on this point. *Gruelle* is the departure from precedent. From the *Warthman*

⁷ The judge in *Gruelle* quotes this same passage in her Initial Decision but emphasizes the hearsay rule, itself, not addressing the exception. See *Gruelle* Initial Decision at 15-16.

decision in 1993, *Sonya Baltimore v. UGI Utilities, Inc.*, Docket No. C-2010-2211726 (Final Order entered July 15, 2011), through *Herp* in 2016, and most recently in *Frompovich*, the “admission against interest by an agent,” exception to the hearsay rule is well established, and Blue Pilot’s objection is not a, “proper objection.”

2. The Commission’s Authority to Order a Refund or Credit

Blue Pilot contends that the Commission does not have the authority to direct Blue Pilot to issue a refund or credit to the Complainant. Blue Pilot Main Brief at 6. Blue Pilot also argues that as the Commission does not have the authority to regulate EGS prices, it does not have the authority to direct refunds. Blue Pilot Main Brief at 8.

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly as contained in the Public Utility Code. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992) *alloc. denied*, 637 A.2d 293 (Pa. 1993). It is well established that the Commission does not have the authority to order a public utility to pay monetary damages. See *Byer v. Peoples Natural Gas Co.*, 380 A.2d 383 (Pa. Super. 1977) (holding that the Commission does not have the authority to award damages); *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1977) (holding that the Commission does not have the authority to award damages), *DeFrancesco v. Western Pennsylvania Water Company*, 499 Pa. 374, 453 A.2d 595 (1982); *Elkin v. Bell of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980). The Commission does not have the authority to award damages.

Section 501 of the Public Utility Code gives the Commission broad authority to address and remedy violations of the Public Utility Code and protect the rights of the public. See 66 Pa.C.S. § 501; see also *Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.*, Docket No. C-2014-2427657, Opinion and Order (Dec. 18, 2014) (*IDT Order*). In the *IDT Order*, the Commission specifically held that, in addition to having the authority to direct EGS refunds for slamming violations or when a customer has, otherwise, been

switched to an EGS without his or her consent pursuant to 52 Pa.Code § 57.177(b), the Commission has plenary authority under 66 Pa.C.S.A. § 501 in conjunction with 52 Pa.Code § 54.4(a) to direct an EGS to issue a credit or refund for an over bill. *IDT Order* at 17. The Commission stated:

Directing a billing adjustment for an EGS over bill of supply charges is within the Commission's Section 501 powers to carry out the consumer protections in the Electric Competition Act that are applicable to competitive electricity generation supply service. These consumer protections include the Section 2809(b) requirement that EGSs comply with the Commission's Regulations, including the Chapter 54 billing and disclosure regulations. Having the authority to order EGS credits and/or refunds carries out these statutorily-prescribed consumer protections by ensuring that electric generation supply bills are adjusted accordingly when an EGS, for example, fails to bill a customer in accordance with its disclosure statement, in violation of the Commission's Chapter 54 Regulations and, in turn, Code Section 2809(b). Thus, having the authority to order EGS billing adjustments, including refunds, under the appropriate circumstances, helps ensure that EGSs comply with the Commission's Regulations and bill customers in accordance with their disclosure statement - a fundamental consumer protection under the Electric Competition Act. *See* 66 Pa.C.S. § 2802(14) (" . . . Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other requirements concerning service as the commission deems necessary for the protection of the public.").

IDT Order at 17-18. (Internal footnote omitted.) *See also Herp*, Docket No. C-2014-2413756, Opinion and Order at 39, 43. (A refund is appropriate when an EGS agent's verbal marketed prices (guarantees of savings) did not conform with the EGS's subsequent billing).

The Commission entered an Opinion and Order tentatively adopting with modifications the Initial Decision of the ALJs, which had approved a joint settlement involving refunds, contributions to EDC hardship funds, corrective action, and civil penalties in *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657, (Tentative Order entered June 30, 2016). In *Werle v. Respond Power*, Docket No. C-2014-2429158 (Order entered January 15, 2015) the Commission explained:

However, we do not agree with the ALJ's statement that because we lack the authority to regulate EGS rates, we also lack the authority to order a refund or credit to the Complainant.

Moreover, in *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (*IDT Order*), we found that the Commission has plenary authority under Section 501 of the Code, 66 Pa.C.S. § 501, to carry out the consumer protections in the Electric Competition 149 Act, and direct an EGS to issue a credit or refund for an over bill in appropriate circumstances. As noted in the *IDT Order*, the appropriate circumstances include situations wherein an EGS fails to bill a customer in accordance with its disclosure statement, in violation of the Commission's Chapter 54 Regulations and the Electric Competition Act.

Accordingly, while we find that we lack the authority to regulate EGS rates, we conclude that we may require EGSs to provide refunds to retail customers in appropriate circumstances.

Id. at 8.

In determining the amount of the refund in this case, I note that Blue Pilot did not challenge the differential calculated by Complainant, an overcharge in the amount of \$5,207.61, which is the difference between the amount that Blue Pilot charged Complainant and the amount that Complainant would have been charged had she remained with PPL from November 21, 2013 through April 28, 2014. Also, and as is discussed in footnote 2, the refund requested in Ms. Smith's Formal Complaint is not fully encompassed by the Commission's recent *Blue Pilot* Opinion and Order. Ms. Smith requested a refund for the time period of November 21, 2013 through April 24, 2018. In Ms. Smith's case, the remedy for the *Blue Pilot* case at Docket No. C-2014-2427655 would encompass only the time period from November 21, 2013 through March 23, 2014. It would not address the period of the fifth month identified in Ms. Smith's complaint from March 24, 2014 through April 28, 2014. Thus, whether the *Blue Pilot* decision is affected by subsequent reconsideration or appeal, Complainant's specific refund/credit is resolved by this proceeding.

3. Complainant's Failure to File a Reply to Blue Pilot's New Matter

In its Main Brief, Blue Pilot claims that Complainant did not file a reply to what Blue Pilot refers to as, "New Matter," and so the Commission *may* rely on those "Affirmative Defenses," to conclude that Blue Pilot provided all required disclosures to Complainant and that Blue Pilot's charges were consistent with the contract between Blue Pilot and Complainant. Blue Pilot Main Brief at 6; See 52 Pa. Code § 5.63(b). The OCA submits that this contention is without merit and that Blue Pilot failed to conform with the requirements of 52 Pa. Code § 5.62, *Answers seeking affirmative relief or raising new matter*:

(a) *Answers seeking affirmative relief.* In its answer, a respondent may seek relief against other parties in a proceeding if common questions of law or fact are present. The answer must conform to this chapter for answers generally and set forth:

- (1) The facts constituting the grounds of complaint.
- (2) The provisions of the statutes, rules, regulations or orders relied upon.
- (3) The injury complained of.
- (4) The relief sought.

(b) *Answers raising new matter.* An affirmative defense shall be pleaded in an answer or other responsive pleading under the heading of "New Matter." A party may set forth as new matter another material fact which is not merely a denial of the averments of the preceding pleading.

I agree with the OCA. Blue Pilot's Answer was filed on April 3, 2015. At that time, Complainant, who is not an attorney, was unrepresented. The Answer was filed by Nazario J. Juredini, in-house Counsel to Blue Pilot and not a member of the Pennsylvania Bar nor before the Commission *pro hac vice*. In this respect, the validity of the Answer is questionable under the Commission's representational regulation at 52 Pa. Code §§ 1.21-1.23, as Blue Pilot is a business entity required to be represented by an attorney. Further, no "New Matter," is identified in the document, and most importantly, no Notice to Plead was provided to Complainant. Under

these circumstances, I decline to rely on Blue Pilot's "Affirmative Defenses," in making any conclusion whatsoever.

Complainant has met her burden of proof, and her Complaint will be sustained.

CONCLUSIONS OF LAW

1. The party seeking affirmative relief from the Commission bears the burden of proof. 66 Pa.C.S. § 332(a).

2. As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the Complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976).

3. The burden of proof must be shown by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 134 Pa.Cmwlth. 218; 221-222, 578 A.2d 600; 602 (1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). A preponderance of evidence is that which is more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

4. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa.C.S. § 704.

5. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa.Super. 1960); *Murphy v. Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa.Cmwlth. 1984).

6. The offense must be a violation of the Public Utility Code, the Commission's regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701.

7. Admissions against interest made by a party have long been held to be admissible in civil proceedings as a recognized exception to the hearsay rule. *Geiger v. Schneyer*, 398 Pa. 69, 157 A.2d 56 (1959); *Gougher v. Hansler*, 388 Pa. 160, 130 A.2d 150 (1957); *Unemployment Compensation Board of Review v. Houpp*, 20 Pa. Commonwealth Ct. 111, 340 A.2d 588 (1975).

8. An agent's acts or declarations, like those of an attorney, when made in the course of one's business and within the scope of one's authority, either express or implied, are admissible against one even if they are hearsay. *Overholtzer v. McMichael*, 10 Pa. 139 (1848); *Truby v. Seybert*, 12 Pa. 101, 104 (1849); *Bell v. Scranton Trust Co.*, 282 Pa. 562, 570, 128 A.2d 494, 496 (1925); *Neel v. Crittenden*, 353 Pa. 201, 205, 44 A.2d 558, 560 (1945)

9. The Commission has plenary authority under Section 501 of the Code, 66 Pa.C.S. § 501, to carry out the consumer protections in the Electric Competition Act, and direct an EGS to issue a credit or refund for an over bill in appropriate circumstances. *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014)

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint filed by Brenda Smith at Docket No. F-2015-2472890 is sustained.

2. That Blue Pilot Energy, LLC, is directed to refund or credit the Complainant \$5,207.61.

3. That the Secretary mark this matter closed.

Date: July 9, 2018

/s/
Dennis J. Buckley
Administrative Law Judge